

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

Cheryl G. Williams,	)	
	)	
Plaintiff,	)	Civ. No. 2000-245
	)	
v.	)	
	)	
Caneel Bay, Inc.,	)	
	)	
Defendant.	)	
	)	
_____	)	
	)	

**ATTORNEYS:**

**Vincent A. Fuller, Jr., Esq.**  
St. Thomas, U.S.V.I.  
*For the plaintiff,*

**Charles E. Engeman, Esq.**  
**David J. Comeaux, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant.*

**MEMORANDUM**

Moore, J.

Defendant Caneel Bay, Inc. ("Caneel" or "defendant") filed a motion to dismiss Plaintiff Cheryl G. Williams' ("Williams" or "plaintiff") complaint for insufficient process and for filing a Title VII action within the 180-day period. Plaintiff opposes this motion. For the reasons set forth below, I will grant defendant's motion to dismiss for insufficient process.<sup>1</sup>

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<sup>1</sup> As this Court will grant defendant's motion to dismiss for insufficient process and it appears that plaintiff actually filed her Title VII action after the 180-day period, this Court need not address defendant's alternative reason for dismissal.

## **I. Factual and Procedural Background**

Williams was a boat captain for Caneel, charged with transporting guests and employees on voyages in local and international waters. Upon resigning her employment, Williams filed suit against Caneel for (1) sex discrimination and harassment under Title VII, (2) a violation of the Virgin Islands Civil Rights Act, (3) a violation of the Wrongful Discharge Act, and (4) breach of contract. Caneel moved to dismiss all counts. In her opposition to Caneel's motion to dismiss, Williams conceded defendant's arguments regarding counts II and III and requested leave to amend count IV in order to set forth the existence of a contract and the breach thereof. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

## **II. DISCUSSION**

Plaintiff filed her complaint on December 2, 2000, but did not serve defendant until April 17, 2001, 134 days after filing. Rule 4(m) of the Federal Rules of Civil Procedure states that

if service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion, or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to the defendant . . .; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

FED. R. CIV. PRO. 4(m). The Third Circuit Court of Appeals has interpreted this rule to require courts to determine whether good cause exists to extend time. See *MCI Telecommunications Corp. V. Teleconcepts, Inc.*, 71 F.3d 1086, 1098 (3d Cir. 1995); *Petrucelli v. Bohringer & Ratziner*, 46 F.3d 1298, 1305 (3d Cir. 1995). Moreover, the Court of Appeals has noted that even if good cause does not exist, a court may use its discretion to extend time. See *MCI Telecommunications*, 71 F.3d at 1098; *Petrucelli*, 46 F.3d at 1305. Accordingly, this Court must first determine whether good cause exists.

In *MCI Telecommunications*, the Court of Appeals noted the test used by the Delaware district court to determine the existence of good cause. The factors a court should look at are (1) the reasonableness of plaintiff's efforts to serve, (2) the prejudice to defendant by the lack of timely service, and (3) whether plaintiff moved for an enlargement of time to serve. See *MCI Telecommunications*, 71 F.3d at 1097 (citing *United States v. Nuttal*, 122 F.R.D. 163, 166-67 (D. Del. 1988)). A review of the record reveals that plaintiff cannot establish good cause under this test. First, Williams apparently made no effort to serve Caneel during the 120 day period. As defendant is located in the Territory and had a registered agent for service of process in St. Thomas, any reasonable, diligent effort to serve would have

been successful.<sup>2</sup> Second, Williams never sought an extension of time to serve during this period. Therefore, as Williams neither used reasonable efforts to serve Caneel nor applied for an extension of time, she has failed to show good cause under this test.

Even though good cause does not exist, I nonetheless can elect not to dismiss the case. Williams offers two reasons why this Court should use its discretion not to dismiss her case. First, she argues that her failure to serve Caneel resulted from "a misunderstanding with a third party regarding the payment of a retainer on her behalf to [counsel]." (Pl.'s Opp. to Def.'s Mot. to Dismiss at 2.). According to Williams, her attorney had agreed to draft and file the complaint on November 27, 2000, and that Williams would pay the retainer the following day. The attorney, in good faith and to meet the requirement to file within 90 days of receiving the right-to-sue letter, filed the complaint. It appears, however, that counsel chose not to serve defendant until he was paid. Second, Williams argues that she will be prejudiced if her case is dismissed as the statute of limitations has run.

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<sup>2</sup> Moreover, counsel for defendant noted in his memorandum in support of motion to dismiss that he "twice agreed to accept service on behalf of Caneel - in January and February, 2001 - both times during the period permitted under Rule 4(m)." (Def.'s Mem. in Supp. of Mot. to Dismiss, at 5.)

None of these arguments, however, are particularly persuasive. First, Williams provides absolutely no support for her arguments. Second, she did not make sure that her attorney was paid and must bear responsibility for her actions. Finally, the fact that the statute of limitations has run does not mandate the use of the court's discretion. "[T]he running of the statute of limitations does not require the district court to extend time for service of process. Rather, absent a finding of good cause, a district court, *may in its discretion still dismiss the case, even after considering that the statute of limitations has run and the refiling of an action is barred.*" *Petrucelli*, 46 F.3d at 1306 (emphasis added). Accordingly, as Williams' reasons for her deficient service are lacking, this Court will not use its discretion to extend Williams' time for service.

### **III. Conclusion**

As neither good cause nor any sufficient reason to justifying the use of this Court's discretion exists, I will grant Caneel's motion to dismiss Williams' complaint for lack of service.

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**ORDERED this 18th day of September, 2001.**

**For the Court**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

Not for publication

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**Charles E. Engeman, Esq.**  
**David J. Comeaux, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant.*

**ORDER**

For the reasons set forth in the foregoing Memorandum of even date, it is hereby

**ORDERED** that defendant's motion to dismiss plaintiff's complaint is **GRANTED**; it is further

**ORDERED** that plaintiff's request of leave of Court to amend Count IV of her complaint is **MOOT**.

**ENTERED** this 18th day of September, 2001.

**For the Court**

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\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

**ATTEST:**  
**WILFREDO MORALES**  
**Clerk of the Court**

By:\_\_\_\_\_/s/\_\_\_\_\_  
Deputy Clerk

cc: Hon. G.W. Barnard  
Mrs. Jackson  
Charles E. Engeman, Esq.  
David J. Comeaux, Esq.  
Vincent A. Fuller, Jr.,  
Esq.  
Michael Hughes, Esq.